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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 749

HENRY HEIDE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

No. 783

CANDY AND CONFECTIONERY WORKERS UNION, LOCAL 452, AFL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Heide Pet. 21-30) is reported at 219 F. 2d 46. The findings of fact, conclusions of law, and order of the National

Labor Relations Board (B. A. 254-270, 201-225)[1] are reported at 107 NLRB 1160.

JURISDICTION

The decree of the court below was entered on February 11, 1955. The petition for a writ of certiorari on behalf of Henry Heide, Inc. was filed on April 26, 1955, that on behalf of Candy and Confectionery Workers Union, Local 452, AFL, on May 11, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10(e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are as follows:

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *;

(3) by discrimination in regard to hire or

[1] References designated "B.A." are to the Appendix to the Board's brief in the court below.

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tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining

and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. * * *

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QUESTION PRESENTED

Whether the employer's refusal to bargain with the collective bargaining representative of the employees four months after it had been so certified by the Board was violative of the National Labor Relations Act notwithstanding the pendency of petitions to redetermine representation which were based on the employer's belief that the certified union had lost its majority status and on the rival claim of another union to represent the employees.[2]

STATEMENT

I. The Board's findings of fact

Briefly, the Board found that petitioner Henry Heide, Inc., herein called Heide, violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Candy and Confectionery Union, Local 50, CIO, herein called Local 50, a few months after it had been certified as the exclusive bargaining representative of Heide's employees; by thereafter conditioning bargaining with Local 50 upon its acceptance of a contract limited to the remainder of the certification year; and by withdrawing recognition from Local 50 immediately at the end of the certification year. The Board also found that Heide violated Section 8(a)(2), (3), (5) and (1) of the Act by subsequently entering into a contract

[2] The petitioners have subdivided this basic issue into five and six separate questions. However, except for the question of bad faith which the court below properly found was not essential to the relief granted, the petitioners are merely playing variations on the main theme.

with petitioner Candy and Confectionery Workers Union, Local 452, AFL, herein called Local 452, granting it exclusive recognition as the bargaining representative of its employees and containing a maintenance of membership clause. The Board's subsidiary findings may be summarized as follows:

1. *Heide's refusal to bargain with Local 50 four months after its certification by the Board*

Local 50 was first certified by the Board as the exclusive bargaining representative of Heide's employees in 1945 and thereafter entered into a series of collective bargaining agreements with Heide, the last of which was to expire on May 15, 1951 (B. A. 203-204; 112-113, 31-32). On April 12, 1951, after Local 50 had proposed negotiations for a new contract, Local 452 filed a representation petition with the Board (B. A. 204; 33, 34, 113-116). The Board conducted an election, Local 50 won, and on October 9 it was again certified by the Board (B. A. 204, 255-256; 116, 119, 35-37).

Bargaining between Local 50 and Heide began shortly thereafter, notwithstanding the fact that Local 50 had begun a strike a few weeks before the certification issued (B. A. 204, 255-256). The parties were unable to reach an agreement (B. A. 204-205, 256; 118- 125, 129-130, 180-181). A strike settlement agreement was signed on January 3, 1952 (B. A. 205, 256; 41-42, 131-132). It provided, *inter alia*, that Heide would endeavor to reemploy the strikers but that strike replacements need not be

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dismissed [3] and that employees who were members of Local 50 be required to maintain their membership (B. A. 205; 42).

Contract negotiations were resumed in February (B. A. 206, 256; 136). On or about February 15, Local 452 notified Heide that it claimed to represent a majority of the employees and intended to file a representation petition with the Board to determine its representative status (B. A. 206, 256; 136-137). Heide thereupon informed Local 50 of Local 452's claim, stated that it doubted Local 50's majority, and "saw no reason to continue . . . negotiations until such time as an election was held to prove who represented the majority" (B. A. 206; 136-137).

On February 19, 1952, both Heide and Local 452 filed representation petitions with the Board, each alleging that a question existed as to what union represented the employees (B. A. 206, 256; 139). On March 6, the Board's Regional Director dismisseed both petitions as prematurely filed since a Board certification of bargaining representative is normally valid for at least one year. Heide and Local 452 appealed the dismissals to the Board which on April 2 sustained the Regional Director's ruling (B. A. 206, 256; 46-47, 49, 140-141, 143). Two days later, Local 452 filed a petition to decertify Local 50 which the Regional Director also dismissed as untimely (B. A. 207, 256). On ap-

[3] The record does not show how many employees went on strike or how many strike replacements were retained (B.A. 205, n. 1).

peal, the Board on May 14 affirmed the Director's action (B. A. 207, 256; 145-146, 148, 149-150). Admittedly, during the pendency of these various petitions and appeals, Heide refused to bargain with Local 50 despite requests that it do so (B. A. 206-207, 256; 141, 144, 150, 194, 51, 52, 54, 57-58).

2. *Heide's conditioning of further bargaining on Local 50's acceptance of a contract terminating on October 9, 1952*

On May 28, following the final disposition of the last of the above appeals, Heide and Local 50 met again (B. A. 207, 260; 153-154). Heide again questioned Local 50's majority, voiced its belief that the employees had joined Local 452, and further stated that it would not execute any agreement with Local 50 effective beyond the following October 9, the end of its certification year (B. A. 207, 260; 154-155). This proposal would have limited any contract reached by the parties to a period of a little more than four months. When Local 50 rejected that proposal, Heide declined to continue negotiations unless Local 50 was willing, among other things, to negotiate on that basis (B. A. 207-208, 260; 154-155, 66-73). Local 50, on the other hand, took the position that the duration of the contract was a matter for "negotiation and contingent on more important matters of collective bargaining" (B. A. 208, 260; 69).

The parties met again in August, 1952, but Heide insisted that any contract must expire at the end of the certification year. However, it did offer to sign a contract extending beyond that date if the

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union would agree to an election and would agree that the contract would be inoperative if it lost the election (B. A. 208; 166-167, 193-194). Local 50 rejected these proposals (B. A. 208; 166-167, 193-194).

In September Local 452 filed another representation petition which the Regional Director dismissed because of the issuance of the complaint in the instant case (B. A. 209; 85, 86-87, 165).

3. *Heide's withdrawal of recognition of Local 50 and its subsequent contract with Local 452*

On October 10, 1952, the day after Local 50's certification year expired, Heide notified the Union that it would no longer recognize it as the bargaining representative of the employees because it doubted Local 50's majority and because the certification year had expired (B. A. 209, 261; 88-90). Thereafter, Local 452 demanded recognition as the bargaining representative of the employees and threatened economic sanctions unless it was granted (B. A. 209, 261; 88-90). Upon the basis of a card check disclosing that Local 452 had cards for 216 of the 361 employees in the unit, Heide recognized it as the employees' bargaining representative and entered into a contract granting it exclusive recognition and containing a maintenance of membership clause (B. A. 210, 262; 99, 101, 102-105).

II. The Board's conclusions of law and order

Applying its rule that an employer, absent unusual circumstances, must honor a certification of

bargaining representatives for a reasonable time, normally one year, the Board found that Heide violated Section 8(a) (5) and (1) of the Act by refusing to bargain with Local 50 four months after it had been certified and during the pendency of the representation petitions filed by Heide and Local 452 with the Board. The Board rejected Heide's claim that the alleged loss of majority status by Local 50 coupled with the filing of the representation petitions constituted "unusual circumstances" warranting a departure from the one-year rule and excusing Heide's failure to bargain with Local 50 (B. A. 255-259). The Board also found that Heide at all times after February 19, 1952, had no intention of honoring Local 50's certification but was merely attempting to delay reaching any new agreement during the certification year, in the expectation that at the end of the year it would withdraw recognition. The Board concluded that in this context of bad faith Heide further violated Section 8(a)(5) by insisting that the duration of any contract with Local 50 be limited to the certification year and by conditioning bargaining on that basis; by terminating recognition of Local 50 immediately upon the expiration of the certification year; and by recognizing Local 452 on the basis of a card check while a complaint alleging a refusal to bargain with Local 50 was pending before the Board (B. A. 260-263).

Finally, the Board found that Heide violated Section 8(a)(2), (3) and (1) of the Act by enter-

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ing into a contract with Local 452, granting it exclusive recognition and containing a maintenance of membership clause, the effect of such action being to give support and assistance to, and to encourage membership in, Local 452 (B. A. 263-264).

The Board's order directed Heide to cease and desist from the unfair labor practices found; to withdraw and withhold recognition from Local 452; to bargain with Local 50 on request; and to post the usual notices (B. A. 265-267).

III. The decision of the court below

The court below sustained the Board's findings and conclusions of law. Accordingly, it enforced the Board's order in its entirety. Judge Learned Hand, in a separate concurring opinion, held that although he was not persuaded that Heide had acted in bad faith, nevertheless the Board's order was entitled to enforcement in full on the basis of the Board's findings that Heide had refused to bargain with Local 50 during the operative period of the certification and had continued in that refusal after the expiration of the certification year.

ARGUMENT

The heart of petitioners' case here (Heide Pet. 7-19; Local 452 Pet. 6-20) is that in view of the alleged doubts concerning Local 50's representative status and the rival claim of Local 452 to represent the employees four months after the Board had duly certified Local 50 as the employees' bargaining representative, Heide was then justified in refusing to bargain further with Local 50 pending

the resolution of the representation question by the Board. The decision of this Court in *Ray Brooks* v. *National Labor Relations Board,* 348 U. S. 96, is dispositive of this issue. There, as here, the employer asserted that he could lawfully refuse to bargain with the certified union within the certification year because of "evidence that his employees [had] deserted their certified union * * *" (348 U. S. at p. 103). This Court rejected that argument, holding that the Board's certification year rule which requires an employer to bargain with a certified union for that period, despite any alleged intervening loss of majority status, was a valid exercise of the Board's administrative authority. Moreover, as the Court further held (p. 105), contrary to petitioners' suggestion, "the Board's view that the one-year period should run from the date of certification rather than the date of election seems within the allowable area of the Board's discretion in carrying out congressional policy. * * * Otherwise encouragement would be given to management or a rival union to delay certification by spurious objections to the conduct of an election and thereby diminish the duration of the duty to bargain."[4]

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[4] *National Labor Relations Board* v. *Globe Automatic Sprinkler Co.*, 199 F. 2d 64 (C.A. 3), cited by petitioner Heide (Pet. 7) as in conflict with the instant case, "held that a 'reasonable period' [for which a certification was to be operative] depended on the facts of the particular case." (*Brooks*, 348 U.S. at p. 102). That case was decided prior to *Brooks*. This is also true of *National Labor Relations Board* v. *Vulcan Forging Co.*, 188 F. 2d 927 (C.A. 6), cited by petitioner Local

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Petitioners assert, however, that Heide, in refusing to bargain with the certified union, acted in good faith since both petitioners sought to invoke the Board's processes to resolve the rival claims of the two unions to representative status. But there was no suggestion in the *Brooks* case that the employer there was not acting in good faith. Nor is it of any significance that petitioners sought to have the Board investigate the representative status of Local 50 or Local 452. "If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indication that his claim has merit." *Brooks, supra,* 348 U. S. at p. 103. The Board in the instant case gave no indication that petitioners' claim for relief from the outstanding certification in favor of Local 50 had merit; on the contrary, it properly dismissed the representation petitions on the basis of its certification year rule which this Court approved in *Brooks.*[5]

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452 (Pet. 19), where the Sixth Circuit held that the employer could lawfully refuse to bargain with the certified union which the employees repudiated five weeks after the issuance of the certification. See *Brooks, supra, loc. cit.*

[5] The petitioners do not specifically treat with the findings of the Board or of the court below relative to the good faith of the employer in conditioning its bargaining on the acceptance of a short term contract or relative to the withdrawal of recognition of Local 50 and recognition of Local 452 immediately on the termination of the certification year. These findings probably could not stand if the holding on the main issue were reversed, so that by attacking the main issue petitioners are attacking the entire case.

CONCLUSION

For the reasons stated, it is respectfully submitted that both petitions for a writ of certiorari should be denied.

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MAY, 1955.

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CERTIORARI DENIED